No. 78-21

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES MANNING AND WALTER HELM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1978. On June 2, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to July 3, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the district court abused its discretion by sentencing petitioners after

considering all the information in their presentence reports, including statements that petitioners had connections with organized crime.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted of participation in an enterprise affecting interstate commerce through the collection of unlawful debts, in violation of 18 U.S.C. 1962(c). Petitioners were sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. 1a-2a).

1. The sufficiency of the evidence at trial is not disputed. Briefly, it showed that petitioners were bookmakers who were associated with the Active Check Cashing Agency, through which they collected illegal gambling debts from William Graham. Graham, an accountant for Philco-Ford Corporation, had embezzled checks from his employer and had used the checks to place wagers on horses with petitioners and to pay off his accrued gambling debts to them (Pet. App. 6a-7a). Checks totaling $149,238 were cashed through Active and used in this manner.

2. Before sentencing, each petitioner was allowed to see the presentence report prepared by the probation office. The report on petitioner Manning related that, according to informants, petitioners had connections with organized crime. At sentencing, petitioner Manning's counsel asked the court to disregard any information that "the probation office learned from talking to someone who is not here as to Mr. Manning's alleged connections with organized crime" (Pet. App. 10a). He also stated that, if petitioner had any such connections, they should be

proven to the court's satisfaction. The trial judge responded by reminding counsel that, "under the United States Code the court is allowed to consider additional matters other than what is admissible at a trial, other than admissible evidence" (*ibid.*). After hearing further argument from counsel and granting allocution, the court sentenced petitioner Manning to three years' imprisonment (*id.* at 11a-12a).

Counsel for petitioner Helm then said that he joined in the motion for an opportunity to rebut the statement in the presentence report. Although the court denied his request for a continuance of the sentencing (Pet. App. 12a), it allowed petitioner to present five witnesses to testify about his good reputation in the community (S. Tr. 10-15). Following a statement from counsel and allocution, the court also sentenced petitioner Helm to three years' imprisonment.

ARGUMENT

Petitioners were convicted of a crime that subjected them to a maximum penalty of 20 years' imprisonment and a fine of $25,000. They nonetheless contend that their sentences of three years' imprisonment were illegal because the district court refused to disregard the information in the probation report that they had connections with organized crime. This contention was properly rejected by the court of appeals.

It is well settled that a trial judge in the federal system has wide discretion in determining an appropriate sentence within the limits imposed by Congress, that in making that determination he "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come" (*United States* v.

Tucker, 404 U.S. 443, 446), and that a sentence within statutory limits is generally not subject to appellate review. See *United States* v. *Grayson*, No. 76-1572, decided June 26, 1978, slip. op. 9. See also *United States* v. *Tucker*, *supra*, 404 U.S. at 447-448; *Williams* v. *New York*, 337 U.S. 241. These principles are codified by statute, 18 U.S.C. 3577, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

The deference given to a trial judge in sentencing reflects the fact that the judge's experience and training are such that he can be trusted to ascribe only minimal weight to conclusory assertions in reports attributed to unidentified sources. It is also based on the recognition that "[p]robation workers making reports of their investigations have not been trained to prosecute but to aid offenders." *Williams* v. *New York*, *supra*, 337 U.S. at 249. Accordingly, this Court has consistently held that reliance upon hearsay in assessing punishment is not *per se* improper. *Williams* v. *Oklahoma*, 358 U.S. 576, 584; *Williams* v. *New York*, *supra*, 337 U.S. at 247. Only if the sentence has been based upon materially false information about a defendant's prior record is the trial judge's exercise of discretion open to attack. *United States* v. *Tucker*, *supra*, 404 U.S. at 447; *Townsend* v. *Burke*, 334 U.S. 736, 741.

In applying these principles and in reconciling *Tucker* and *Williams*, the courts of appeals have held that a defendant is entitled to some protection against the danger of a court's reliance on erroneous hearsay allegations in imposing sentence. Thus, in cases where a

defendant has received the maximum or a particularly harsh sentence not otherwise warranted by the offense, suggesting that the district court may have taken the damaging hearsay information into account, or where the court has explicitly stated that its sentence was bottomed on the hearsay, and the accuracy of that information is contested, the defendant has been permitted an opportunity to rebut the information. See, *e.g.*, *United States* v. *Harris*, 558 F. 2d 366, 371 (C.A.7); *United States* v. *Perri*, 513 F. 2d 572, 573 n. 1 (C.A. 9); *United States* v. *Looney*, 501 F. 2d 1039, 1041 (C.A. 4); *Collins* v. *Buchkoe*, 493 F. 2d 343, 344-345 (C.A. 6); *United States* v. *Espinoza*, 481 F. 2d 553, 554-555 (C.A. 5); *United States* v. *Walker*, 469 F. 2d 1377, 1380 (C.A. 1), certiorari denied, 410 U.S. 989; *McGee* v. *United States*, 462 F. 2d 243, 246 (C.A. 2).

In the instant case, the sentences petitioners received did not remotely approach the maximum permitted by law: instead of a possible 20 years' imprisonment and fine of $25,000, each petitioner was sentenced to three years in prison.[1] These sentences indicate that the trial judge ascribed minimal weight to the contested statements in the presentence reports concerning petitioners' involvement in organized crime, and they thus serve to distinguish this case from *United States* v. *Weston*, 448 F. 2d 626, 630-631 (C.A. 9), certiorari denied, 404 U.S. 1061, and the other decisions cited by petitioners (Pet. 11), in which the defendants received either maximum sentences or

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[1]The evidence at trial justified the sentences. Petitioners were shown to be not simply two individuals acting by themselves in running a small-time gambling operation, but rather entrepreneurs of an extensive and well-organized business that, in collecting the enormous gambling debts owed by Graham, utilized the services of an interstate enterprise to cash a substantial number of stolen corporate checks.

sentences conceded to be well in excess of the normal punishment for the crime involved. Compare *United States* v. *Shelby*, 573 F. 2d 971, 976 (C.A. 7); *United States* v. *Bass*, 535 F. 2d 110 (C.A. D.C.); *United States* v. *Williams*, 499 F. 2d 52, 55n. 4 (C.A. 1); *Fernandez* v. *Meier*, 432 F. 2d 426, 427-428 and n. 2 (C.A. 9). Significantly, the court in its colloquy with counsel at sentencing did not expressly rely on, or even refer to, any item in the presentence report and instead asked counsel several questions about "evidence in the case that was before the jury" (S. Tr. 7).[2] Moreover, the statement in the report that petitioners had connections to organized crime did not imply much beyond what experts have concluded—that most large-city gambling enterprises are controlled by organized crime. See The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime*, p. 2 (1967).

The decision below is not inconsistent with Fed. R. Crim. P. 32(c)(3), since that rule grants the district court discretion to limit the introduction of evidence relating to information in the presentence report.[3] It also does not conflict with either *United States* v. *Fatico*, C.A. 2, No. 78-1003, decided June 12, 1978, or *United States* v. *Perri*, *supra*, on which petitioners rely (Pet. 6-7). In *Fatico*, the court held that the Due Process and Confrontation

[2]The trial judge was quite knowledgeable about the facts in the case, since he had been involved in several related cases with different defendants (S. Tr. 5).

[3]Indeed, the trial judge's refusal to permit petitioners to adduce evidence rebutting the "organized crime" assertions in the presentence report, especially when combined with the judge's failure to allude to those assertions during the sentencing hearing, is further proof that he gave little if any weight to that evidence. Petitioners' objections obviously put the judge on notice that they contested the accuracy of that portion of the Report.

Clauses did not prohibit the trial judge's consideration in sentencing of the testimony of an F.B.I. agent that an undisclosed reliable informant and member of an organized crime family had told the agent that the defendants were members of the same family (slip op. 3469-3470). *Perri*, on the other hand, is plainly distinguishable from this case for the reasons noted above, since there the district court denied the defendant access to a confidential report contaning allegations that the defendant was a representative of organized crime and then imposed the maximum sentence, stating explicitly that the sentence was based on the contested allegations in the report.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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